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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Joint Petition for Rulemaking to Establish Rules for Subscriber Access to Cable Home Wiring for the Delivery of Competing and Complementary Video Services	)	RM - 8380

REPLY COMMENTS OF
TIME WARNER ENTERTAINMENT COMPANY, L.P.

Fleischman and Walsh
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 939-7900

Dated: January 19, 1994

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SUMMARY

- **<u>The Commission's authority to regulate cable home wiring does not extend beyond the limited scope granted by the 1992 Cable Act.</u>**

Section 16(d) of the 1992 Cable Act grants the Commission specific, limited authority to implement cable home wiring rules that apply <u>after</u> a subscriber terminates cable service. The Commission does not have broader authority, via some other, more general statute, to implement cable home wiring rules that apply prior to subscriber termination of cable service. Thus, the Commission cannot enact cable home wiring rules pursuant to the requests set forth in the USTA Petition.

The existing home wiring rules are within the plain language of Section 16(d) of the 1992 Cable Act, and adhere to Congress' intent with regard to that provision as well. Cable home wiring rules purporting to extend beyond Congress' mandate, as expressed in the statute and its legislative history, would raise substantial concerns over important issues such as signal leakage, theft of service, and unconstitutional takings. The very real possibility of an unconstitutional taking resulting from broad home wiring rules should not be overlooked, especially in light of the existing situation between Time Warner and Liberty in MDUs in Manhattan.

- **The home wiring rules USTA would have the Commission implement fail to recognize the financial burden the cable <u>industry alone has borne by "wiring the nation."</u>**

The cable industry alone has borne the financial burden of installing wiring in homes and MDUs over which subscribers can receive multichannel video programming services. Pursuant to the universal service requirement of some local franchises, and in compliance with the 1984 and 1992 Cable Acts' prohibition of "cream skimming" by franchised cable operators, the cable industry has spent large sums of money in resources, materials and labor to install and upgrade cable home wiring nationwide. The Commission should not implement home wiring rules that simply ignore this enormous contribution by the cable industry and further disadvantage cable operators by forcing them to relinquish control over their wiring to competing and complementary communications services; rather, it should allow cable operators to retain exclusive control over cable home wiring while it is still providing service, and allow subscribers to gain access to such wiring only upon termination of cable service.

Cable operators have assumed the cost of installing the necessary home wiring to provide cable service to millions of subscribers nationwide. Competitors' claims that home wiring costs pose an "insurmountable barrier" are specious -- there is no reason why other MVPDs could not install their own wiring in subscribers' homes as cable operators have done. If the Commission enacts home wiring rules that force cable operators to yield control over home wiring prior to termination of cable service, cable operators will necessarily be discouraged from wiring unwired areas and upgrading existing home wiring in contravention of the Commission's goals for its home wiring rules.

- **The Commission should pursue a policy whereby each service provider is encouraged to install its own wiring in the subscriber's home, thereby maximizing the subscriber's ability to choose among competing services.**

Unrestricted subscriber access to cable home wiring is not necessary to foster competition or "level the playing field" in the provision of video services. The Commission should recognize the enormous investment the cable industry has already made by installing home wiring nationwide, and seek to balance the scales by allowing cable operators to retain control over home wiring while subscribers are still receiving cable service, and encouraging competing and complementary services to install their own home wiring so that they can offer their services simultaneously with cable service.

Competing and complementary communications services should not view installing home wiring as "redundant;" rather it is a necessary cost of doing business that they should expect to incur if they indeed want to deliver service to subscribers' homes via a wire. Moreover, cable home wiring is not physically capable of simultaneously transmitting two or more video signals over the same frequency. Thus, if a cable operator is still providing cable service over its wiring, a second service provider will need to install its own wiring if it desires to offer its service simultaneously with cable service.

- The Commission should reject wholesale adoption of the telephone inside wiring rules for cable home wiring.

Congress has expressly stated that cable operators are not to be treated as common carriers with respect to home wiring rules. While the telephone and cable industries may be converging, they have not yet converged and cannot be treated alike with regard to internal wiring rules. There are important regulatory differences between telephone and cable home wiring, such as prevention of signal leakage and maintenance of various technical standards, that make wholesale adoption of the telephone inside wiring rules impracticable for cable home wiring. In addition to the regulatory differences between the two types of wiring, telephone wiring and cable wiring also have certain physical differences, and, therefore, necessitate different rules pertaining to the regulation thereof.

If the Commission is going to adopt cable home wiring rules that are similar to its telephone inside wiring rules, it should do so selectively, bearing in mind the particular concerns involved with cable home wiring that are not present in the telephone inside wiring context.

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REPLY COMMENTS

Time Warner Entertainment Company, L.P. ("Time Warner"), hereby respectfully submits these reply comments in response to the comments filed pursuant to the above-captioned Joint Petition for Rulemaking[1] released by the Federal Communications Commission ("Commission") on November 15, 1993. Time Warner is majority owned by Time Warner Inc., a publicly traded company, and consists principally of three unincorporated divisions: Time Warner Cable, which operates cable systems; Home Box Office, which wholly owns two premium television services (the HBO service and Cinemax), and is 50% owner of one non-premium service

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[1] Joint Petition for Rulemaking of Media Access Project, United States Telephone Association, and Citizens for a Sound Economy Foundation, RM - 8380 (rel. Nov. 15, 1993) ("USTA Petition").

(Comedy Central); and Warner Bros., which produces and distributes motion pictures and television programs.

I. INTRODUCTION

Several of the comments filed in response to the USTA Petition support proposals made by the parties to that petition (hereafter collectively referred to as "USTA") that far exceed the scope of the Commission's explicit authority regarding the implementation of cable home wiring rules, and that will not result in a "level playing field" for cable operators, competing multichannel video programming distributors ("MVPDs") and complementary service providers. Time Warner takes this opportunity to respond to many of the points raised in the comments, and to again urge the Commission to refrain from amending the existing home wiring rules or from implementing new home wiring rules that are inconsistent with Congress' mandate, as set forth in Section 16(d) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[2]

II. THE COMMISSION'S AUTHORITY TO REGULATE CABLE HOME WIRING DOES NOT EXTEND BEYOND THE LIMITED SCOPE GRANTED BY THE 1992 CABLE ACT.

Numerous commenters support USTA's proposal to initiate a rulemaking whereby the Commission would fashion cable home wiring rules that would apply <u>prior</u> to subscriber termination of cable

[2]Pub. L. No. 102-385, 106 Stat. 1460, § 16(d) (1992), codified at 47 U.S.C. § 544(i) ("Section 16(d)").

service.[3] These commenters, however, have all failed to recognize the complete lack of jurisdiction by the Commission to take such broad action regarding cable home wiring. As Time Warner and other commenters explained in their comments, the Commission's authority to regulate cable home wiring now derives exclusively from the 1984 and 1992 Cable Acts, and specifically from Section 16(d) of the 1992 Cable Act.[4] While the Commission's authority to impose its former regulations on cable television once stemmed from broad language in the Communications Act of 1934,[5] that authority has since been superseded by the 1984 and 1992 Cable Acts, the specific purpose of which is to

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[3]See, e.g., Association of Independent Television Stations ("AITS") Comments at 1-2; BellSouth Telecommunications, Inc. ("BellSouth") Comments at 1; GTE Service Corporation ("GTE") Comments at 2-3; Liberty Cable Company, Inc. ("Liberty") Comments at 2; NYNEX Comments at 5; Utilities Telecommunications Council ("UTC") Comments at 2. All citations and references made to "Comments" herein refer to those documents filed with the Commission in this proceeding, RM - 8380, unless otherwise noted.

[4]See Time Warner Comments at 5-6 & n.11; National Cable Television Association, Inc. ("NCTA") Comments at 3-5 (Section 3 of the 1984 Cable Act explicitly amended Section 2(a) of the Communications Act of 1934 to grant the Commission exclusive jurisdiction over cable television as provided in Title VI, entitled "Cable Communications;" thus, Title VI superseded the "ancillary to broadcasting" standard over cable television that was grounded in the Communications Act of 1934); Continental Cablevision, Inc. ("Continental") Comments at 3-4.

[5]See 47 U.S.C. § 152(a); United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (Commission had broad ancillary jurisdiction to regulate cable television under a general provision of the Communications Act of 1934 because, at the time of the decision, there were no statutory provisions specifically addressing the regulation of cable television).

regulate the cable television industry.[6] Thus, USTA's reliance on the ancillary jurisdiction over cable television that the Communications Act of 1934 bestowed upon the Commission[7] is outdated and no longer applicable.[8] The Commission, therefore, has no legal basis to go beyond the authority granted by the 1992 Cable Act in regulating cable home wiring.[9]

When Congress enacted Section 16(d) of the 1992 Cable Act, it carefully considered competitive issues and concerns specifically associated with cable wiring, such as signal leakage and theft of service, and drafted a home wiring provision limited in scope to instances where the subscriber has terminated cable television service.[10] The plain language of the home wiring provision states that the "Commission shall prescribe rules concerning the disposition, <u>after a subscriber to a cable system terminates service</u>, of any cable installed by the cable operator

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[6]<u>See</u> Meyerson, "The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires," 19 Ga. L. Rev. 543, 547-51 (1985) (Commission's broad regulatory authority over cable television was sharply limited by the defined mandate of the 1984 Cable Act); <u>see also</u> Continental Comments at 4 ("Congress' specific delineation of the Commission's rulemaking authority over inside wiring takes precedence over the general mandate provided in Title I" of the Communications Act of 1934).

[7]<u>See</u> USTA Petition at 8.

[8]<u>See</u> Cablevision Industries Corp., <u>et al</u>. ("Cablevision") Comments at 3-4; NCTA Comments at 3-5.

[9]<u>See</u> NCTA Comments at 5.

[10]<u>See</u> Continental Comments at 2 (Congress' refusal to authorize the Commission to implement cable home wiring rules prior to subscriber termination of service reflected a careful balancing of competitive issues with concerns for signal leakage and theft of service).

within the premises of such subscriber."[11] The legislative history reiterates Congress' intent that home wiring rules were to apply only <u>after</u> a subscriber terminates cable service.[12] In the face of this clear congressional mandate, the Commission cannot stretch its authority and enact home wiring rules that apply prior to subscriber termination of cable service, as USTA has advocated.[13]

Moreover, as Time Warner has mentioned repeatedly in this proceeding and in the initial home wiring proceeding, the fifth amendment taking concerns associated with forcing a cable operator to yield ownership of its home wiring while it is still providing cable service over that wiring, or before it has even begun to provide cable service, are real and cannot be shrugged off by the Commission.[14] For example, Time Warner is currently

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[11]47 U.S.C. § 544(i) (emphasis added).

[12]<u>See</u> H.R. Rep. No. 628, 102d Cong., 2d Sess. 118 (1992) ("House Report") ("subscribers who terminate cable service should have the right to acquire wiring that has been installed by the cable operator in their dwelling unit"); S. Rep. No. 92, 102d Cong., 1st Sess. 23 (1991) (home wiring provision "addresses the issue of what happens to the cable wiring inside a home when a subscriber terminates cable service").

[13]It also follows that the Commission lacks authority to establish rules covering <u>all</u> wiring used to deliver broadband video services, because such rules are also far outside the Commission's limited scope of authority granted by Section 16(d). New York City Department of Telecommunications and Energy ("New York City") Comments at 3.

[14]<u>See</u>, <u>e.g.</u>, Time Warner Comments at 6-8; Time Warner Reply Comments, in MM Docket 92-260, at 16-19; Time Warner Response to Petitions for Reconsideration, in MM Docket 92-260, at 13-14 & n.29; <u>see also</u> Secretary of Defense Comments, in MM Docket 92-260, at 3.

involved in a dispute with Liberty[15] over cable wiring that Time Warner's Manhattan affiliate, Paragon Cable Manhattan ("Paragon"), installed in a new, high-rise multiple dwelling unit ("MDU") building in Manhattan. The developers of that MDU offered Paragon the opportunity to pre-wire the building for cable television service while it was still under construction. Paragon installed a sophisticated conduit cable system in the building at a cost of over $60,000 in wiring, equipment and associated installation costs.[16] Paragon wired the building with the expectation that it would be offering and providing cable television service to the residents thereof.

As tenants moved into the building, Paragon began to provide cable service, on an individual subscriber basis, to those residents who requested it. Just three months after Paragon began providing cable service, Liberty began providing its unfranchised MVPD service throughout the entire building pursuant to a contract with the building's management. Liberty, however, did not construct its own internal video distribution system. Rather, it illegally seized control of thousands of feet of cable wiring and equipment installed by Paragon at a cost of tens of thousands of dollars.

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[15]Liberty is an unfranchised MVPD that competes with Time Warner and its affiliates for multichannel video programming subscribers in New York City.

[16]These costs do not, however, include the time spent by Paragon's personnel in supervising and participating in the pre-wire installation.

If the home wiring rules were expanded beyond the scope of authority granted by the home wiring provision such that they included situations like this where a cable operator could lose control over its home wiring while still attempting to provide service, or before it even had the opportunity to provide service to most residents, cable operators would constantly be in jeopardy of losing their valuable property without receiving any compensation. The Commission should not implement rules that create such blatantly unfair and unconstitutional results.

Furthermore, if subscribers, or would-be subscribers, were allowed to acquire home wiring upon installation, then, in a situation such as the one existing between Liberty and Paragon, cable competitors like Liberty would have access to all of the cable operator's wiring -- possibly including wiring extending hundreds of feet outside the subscriber's dwelling unit -- without spending any of their own money or resources to wire the building. Thus, Time Warner Cable New York City and Paragon, who spend tens of thousands of dollars per building to wire and equip MDU buildings in Manhattan for cable service, would be left with no opportunity to compete with Liberty for subscribers, nor would they even have access to their own wiring and equipment. Liberty, on the other hand, would have access to all of Time Warner Cable New York City and Paragon's wiring[17] without having

[17]In cases where conduit, molding and other facilities have been installed by the cable operator along with the cable wiring equipment, these facilities may also constitute the cable operator's property, and cannot simply be ceded to another (continued...)

incurred installation costs, and would be permitted to offer its service to residents of Manhattan MDU buildings. Such a situation invokes a serious question of constitutionality because private property is being taken, pursuant to statutory authority, and no compensation has been paid.[18]

Finally, several commenters have proposed that the Commission move the point of demarcation for cable home wiring so that it is well outside the interior of a home or dwelling unit in an MDU.[19] The Commission simply does not have the authority to move the point of demarcation outside the subscriber's premises because such overreaching would violate clear Congressional intent:

> This provision applies only to internal wiring contained within the home and does not apply to . . . any wiring, equipment or property located outside the home or dwelling unit. . . [T]his section limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit.

* * *

[17](...continued)
provider or to the building owner in derogation of a cable operator's right to just compensation.

[18]The Commission cannot remedy the taking problem simply by establishing a binding formula for compensation because the determination of just compensation is an adjudicatory, rather than an administrative, function. See Florida Power Corp. v. FCC, 772 F.2d 1537, 1546 (11th Cir. 1985), rev'd on other grounds, 480 U.S. 245 (1987).

[19]See Liberty Comments at 4-6; New York City Comments at 6; NYNEX Comments at 3-5; Pacific Bell and Nevada Bell Comments at 5-6; Wireless Cable Association International, Inc. Comments at 3-4; see also Liberty Petition for Reconsideration, in MM Docket 92-260, at 1-5.

> This section deals with internal wiring within a subscriber's home or individual dwelling unit. In the case of multiple dwelling units, this section is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers.[20]

The Commission should clarify, however, that for purposes of wiring that enters the individual apartment units of an MDU building through an internal conduit or from another publicly inaccessible area, the demarcation point must be understood to be the <u>nearest accessible point</u> within twelve inches of the place where the cable enters the interior living space of the apartment. This interpretation does not necessarily require formal amendment of the existing rule. Rather, the point "where the cable wire enters the subscriber's dwelling unit,"[21] should be interpreted to mean the place where the cable enters the interior living space of the apartment (becoming visible to the eye without use of x-ray equipment), not the point where the cable technically crosses the outer perimeter of the apartment unit. Similarly, the term "at (or about) twelve inches,"[22] should be interpreted flexibly yet rationally, with particular emphasis on the words "or about" in situations where the cable enters the apartment through an internal conduit or other publicly inaccessible area. Such an interpretation is generally consistent with the demarcation point for telephone home wiring

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[20]House Report at 118-19 (emphasis added).

[21]47 C.F.R. § 76.5(mm).

[22]<u>Id</u>.

in MDU buildings, which "shall not be further inside the customer's premises than a point twelve inches from where the wiring enters the customer's premises."[23]

III. THE HOME WIRING RULES USTA WOULD HAVE THE COMMISSION IMPLEMENT FAIL TO RECOGNIZE THE FINANCIAL BURDEN THE CABLE INDUSTRY ALONE HAS BORNE BY "WIRING THE NATION."

USTA has baldly asserted that the "cost of installing home wiring can . . . serve as an insurmountable barrier to new entrepreneurial firms offering 'cutting edge' telecommunications services to consumers."[24] Rather than bolstering USTA's argument in favor of pre-termination home wiring rules, this statement merely elucidates USTA's complete lack of respect for the enormous investment the cable television industry has made, and continues to make, in "wiring the nation" for cable service, and reveals USTA's anticompetitive bias against the cable industry's continued success in making multichannel video programming service available to most of the nation's television households.[25]

As a "cutting edge" telecommunications service, cable firms have singlehandedly borne the enormous capital costs associated with wiring homes and MDUs for cable service. Even after

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[23]47 C.F.R. § 68.3.

[24]USTA Petition at 4-5.

[25]Cable television service is currently available to approximately 98% of all television households. See Cable Television Developments, National Cable Television Association, November 1993 at 1-A.

expending large sums of money in resources, materials and labor to install cable wiring nationwide,[26] cable operators have been able to offer cable service despite the allegedly "insurmountable barrier" of having to install such wiring. Moreover, franchised cable operators, unlike unfranchised MVPDs, often are subject to a universal service obligation under their franchises whereby they are not free to pick and choose which neighborhoods or areas they would like to wire for cable service. Unfranchised MVPDs, on the other hand, can "cream skim" and wire only those areas of high population density or high income to ensure that their installation efforts will be worth their while.[27] Unfranchised MVPDs, and other communications services not subject to local franchise requirements, therefore, cannot honestly claim that the installation of wiring acts as an "insurmountable barrier" to offering service when they can assume such low risks on their investment by "cream skimming."

The existing home wiring rules recognize that cable operators have already been disadvantaged by bearing the costs

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[26]The commenters generally agree that installation of internal wiring is "an expensive, time consuming process" that competing and complementary services would somehow like to avoid. E.g., AITS Comments at 2.

[27]Liberty's marketing materials even specifically admit that Liberty is "cream skimming" in New York City by offering its service in "better residential buildings." See letter from Peter Price, President of Liberty Cable, attached hereto as Attachment 1 ("[W]e are breaking the cable TV monopoly in New York by providing bulk service direct from satellite. Liberty is becoming very popular with better residential buildings and fine hotels.") (emphasis added). Time Warner, on the other hand, is obligated to provide service throughout its New York City franchise areas, not just to the "better" buildings.

associated with installing cable wiring, and those rules were carefully implemented so that cable operators would not be further disadvantaged by having to relinquish control over home wiring while they are still providing cable service through the wiring they installed. The existing home wiring rules, by applying only after subscriber termination of cable service, are in full accord with Congress' intent, as manifested in the plain language of Section 16(d), and are also fair to both cable operators and competing and complementary services.

The pre-termination home wiring rules that USTA seeks to have the Commission adopt would force cable operators to cede control over wiring that it paid for, installed, and is currently using to provide cable service to its subscribers.[28] Such a situation is analogous to a merchant who buys materials to build a store, builds the store, and is using the store to sell his wares when he is forced to allow a competing merchant access to some space in the store so he too can sell similar wares to the same pool of customers. It does not thwart the development of the second merchant's business to be denied access to the first merchant's store;[29] rather, the second merchant should have

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[28]See NCTA Comments at 11 ("By urging the Commission to blindly authorize unrestricted access to cable wiring, the telephone companies wish to avoid the expense of wiring individual homes and thereby have cable operators subsidize their entry in the market.").

[29]Contra BellSouth Comments at 1 (cable companies "may impede or thwart the development of competing providers of video programming and other broadband services by denying them access to cable home wiring that they own").

planned on incurring the same start-up costs as the first merchant, and should simply build his own store from which to sell his wares.[30] Similarly, each communications service provider seeking to offer its service via a wire into the subscriber's home should install its own home wiring so that it may offer its service immediately and simultaneously with other services the subscriber may choose to receive.

In short, USTA seeks to impose common carrier obligations on cable operators in direct contravention with the 1984 Cable Act and Congress' intent with regard to home wiring rules enacted pursuant to the 1992 Cable Act.[31] Congress has stated that the home wiring provision

> does not address matters concerning the cable facilities inside the subscriber's home prior to termination of service. In this regard, [Congress] does not intend that cable operators be treated as common carriers with respect to the internal cabling installed in subscribers' homes.[32]

The Commission simply lacks the authority to require cable operators to relinquish control over home wiring prior to termination of service by the customer.[33]

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[30]<u>See</u> Time Warner Comments at 18 ("Competing and complementary communications services should be incurring their own cost of doing business rather than usurping facilities installed at the cable operator's expense.").

[31]<u>See</u> 47 U.S.C. § 541(c) (1984) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."); House Report at 118-19.

[32]House Report at 118-19.

[33]Furthermore, programmers seeking to deliver their programming to cable subscribers are afforded the opportunity to (continued...)

Home wiring rules that force cable operators to relinquish control over cable home wiring prior to termination of cable service will necessarily discourage cable operators from wiring unwired areas and upgrading existing home wiring. Such a result directly conflicts with the Commission's goal that its home wiring rules "should not discourage cable investment in continuing to extend service to unwired homes by failing to account adequately for the property, contractual, and access rights of cable operators."[34]

IV. THE COMMISSION SHOULD PURSUE A POLICY WHEREBY EACH SERVICE PROVIDER IS ENCOURAGED TO INSTALL ITS OWN WIRING IN THE SUBSCRIBER'S HOME, THEREBY MAXIMISING THE SUBSCRIBER'S ABILITY TO CHOOSE AMONG COMPETING SERVICES.

Several commenters have proffered the theory that unrestricted subscriber access to cable home wiring is necessary in order to foster competition among video services providers, and level the competitive playing field which is now allegedly

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[33](...continued)
do so via the Commission's leased channel and programming carriage requirements. See 47 U.S.C. §§ 532(a), 536. The fact that Congress has sought to address the competitive concerns raised by USTA directly provides even further evidence that there is no legal basis for USTA's effort to distort and stretch the cable home wiring provision far beyond its intended purpose. See FCC v. Midwest Video Corp., 440 U.S. 689, 708-09 (1979) (authority to compel cable operators to carry others' programming must come specifically from Congress, and not from the Commission's efforts to strain the limits of its authority).

[34]Notice of Proposed Rule Making in MM Docket 92-260, 7 FCC Rcd 7349, ¶ 2 (1992).

sloped in favor of cable operators.[35] Those commenters are apparently willing to overlook the enormous investment the cable industry has made in installing wiring nationwide, and which its competitors now seek to use without incurring any such expenses of their own.[36] The Commission should not be so willing to overlook the cable industry's investment, however. Rather, it should recognize the tremendous achievement the cable industry has already accomplished by investing time, money and resources into wiring installation,[37] and it should seek to equalize this investment by encouraging all MVPDs who seek to offer their services to subscribers to install their own home wiring.

USTA laments that installing "redundant" wiring is a cost that competing and complementary service providers should not be forced to bear in the interest of promoting competition.[38] This statement begs the question, if cable operators have already been forced to bear the costs associated with wiring, how can the Commission, in an effort to level the competitive playing field, not ask competitors to incur the same costs by installing their

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[35]See, e.g., Liberty Comments at 3-4 ("real competition in the video marketplace will exist only if cable subscribers can conveniently access and utilize the services of alternate providers"); Telecommunications Industry Association ("TIA") Comments at 2-3 (regulatory playing field is uneven because telephone subscribers have greater rights of access to telephone inside wiring than cable subscribers have to cable home wiring).

[36]See supra part III.

[37]See NCTA Comments at 1-2, 10-11.

[38]See USTA Petition at 4 & n.12; AITS Comments at 2 (wiring an already wired home is a barrier to market entry).

own wiring if they want to offer their services to cable subscribers? As NCTA explains, USTA has given

> no regard to the fact that cable operators bore the initial cost to install the wiring -- which is rarely recouped upon installation. Indeed as cable companies pointed out in the home wiring proceeding, operators typically offer discounted or free installation of cable service in order to attract customers in a very competitive video marketplace. Under the new rate regulation, these costs are not recovered in the equipment basket charges, but rather they must be absorbed within the benchmark rate as part of the cable network. It would be unfair to require such operators to compete with another video provider that is able to piggyback onto the operator's own facilities.[39]

Cable operators would also be subject to additional competitive disadvantages if the Commission were to establish home wiring rules in accordance with the proposals set forth in the USTA Petition. Specifically, if a cable operator were forced to yield some portion of its signal capacity to another MVPD, it may not physically or technically be able to deliver the full panoply of its service offerings over the remaining portion of its wiring.[40] Cable home wiring is not physically capable of simultaneously transmitting two or more video signals over the

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[39]NCTA Comments at 11.

[40]Id. at 10. Forcing a cable operator to yield some portion of its signal capacity to another MVPD also invokes first amendment concerns similar to those that have been raised by Time Warner and other parties in litigation regarding the Commission's must-carry regulations. The must-carry issue was argued before the United States Supreme Court on January 12, 1994, and is currently awaiting a decision. See Time Warner's brief in Turner Broadcasting System, Inc. v. FCC, No. 93-44, United States Supreme Court.

same frequency.[41] Adding couplers or combiners that would allow combining of two sets of video channels in different frequency bands, outside the home, is simply not practical.[42] Signal combiners, in many cases would cause the properly engineered cable television signals to no longer meet the signal level requirement of the Commission's cable television technical standards. Thus, a policy requiring that any competing and complementary services install their own internal wiring not only creates a level competitive playing field, but is also necessary because of the physical limitations of cable wiring.[43]

Some commenters have ventured to claim that cable operators have created a bottleneck to control of delivery of broadband

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[41]In addition to jeopardizing the incumbent cable operator's right to utilize the aeronautical frequency bands, and ability to comply with the Commission's strict signal leakage requirements, the Commission's implied task of spectrum allocation in a private, single wire, closed system would be fraught with technical and statutory contradictions.

[42]Moreover, combining two broadband delivery services over the same wire would greatly complicate the use of the consumer's electronic equipment -- TVs and VCRs. The complication of the cable consumer equipment interface would be diametrically opposed to the Commission's legislatively mandated effort to ensure cable consumer equipment compatibility. See Notice of Proposed Rule Making in ET Docket No. 93-7, 1993 FCC LEXIS 5960 (released Dec. 1, 1993).

[43]Telephone inside wiring is "dead" when not being used to place or receive an outside call. Thus, such wiring is susceptible to other uses during such periods by the homeowner. Cable signals, on the other hand, are constantly being transmitted through all cable home wiring, even when all the television sets in the home are turned off. The USTA Petition ignores this crucial distinction. In essence, USTA argues that because a home already has plumbing for water, the natural gas company should be allowed to use the same pipes to distribute gas within that home. USTA's proposal is simply unworkable.

services to subscribers by asserting exclusive rights to use of home wiring while they are providing cable service.[44] This argument is meritless because cable operators "do not possess exclusive broadband access" to cable subscribers' homes;[45] rather, if invited by the homeowner, any other broadband service provider may install its own wiring in a cable subscriber's home to make its service available.[46] Thus, cable operators have not created a bottleneck to delivery of broadband services to subscribers' homes, nor have they thwarted competition simply by claiming the right to use the wiring they installed for the purpose of providing their own service to subscribers.

If the Commission is to achieve the goals of promoting competition, creating a level competitive playing field, and encouraging cable operators to continue to invest in wiring unwired areas and upgrading existing wiring, it should embrace Time Warner's fair and practical policy of allowing each communications service provider to install its own home wiring in subscribers' homes and MDUs. No other proposal set forth in this, or in the initial home wiring proceeding, conforms to the express statutory requirements of the 1992 Cable Act, or meets the goals to which the Commission claims to be committed to achieving.

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[44] See American Public Info-Highway Coalition Comments at 4.

[45] NCTA Comments at 10.

[46] See id. at 10-11 ("There is no legal or regulatory impediment to other service providers installing the facilities necessary for the delivery of alternative services.").

V. THE COMMISSION SHOULD REJECT WHOLESALE ADOPTION OF THE TELEPHONE INSIDE WIRING RULES FOR CABLE HOME WIRING.

Although telephone companies and cable operators are becoming increasingly involved in offering the same types of services, the two industries have not yet converged, and the differences between them necessitate different rules pertaining to internal wiring. When, and if, the two industries do actually converge, a reexamination of the internal wiring rules for both industries may be warranted,[47] but until that time, internal wiring rules must adequately address the separate concerns of telephone and cable wiring.[48]

Congress has expressly stated that cable operators are not to be treated as common carriers with respect to home wiring rules.[49] Important regulatory differences between telephone and

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[47]*See* Continental Comments at 2-3 (if technological or competitive developments warrant a reexamination of the current home wiring policy, the Commission should allow Congress to initiate that process in the context of legislation addressing cable/telco competition and telecommunications infrastructure issues); New York City Comments at 5 ("the dynamic nature of converging technologies compels a detailed analysis of such technologies and their impact upon both the telecommunications marketplace and the public interest prior to proposing practical rules").

[48]The particular concerns associated with cable home wiring that are not present in the telephone inside wiring context are discussed at length in the following sets of comments filed in this proceeding: Time Warner Comments at 20-23; Continental Comments at 8-11; NCTA Comments at 5-10.

[49]House Report at 118-19; *see also* NCTA Comments at 6-7; Continental Comments at 8-9; Cablevision Comments at 3-4 ("Not only does the statute *not* affirmatively grant to the Commission authority to impose telephone interior wiring rules on cable operators but it expressly constrains the Commission's authority to do so.").